Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01–11 OF 2009(W)

ALAUDDIN PCA, ARIFIN ZAKARIA CJ (MALAYA), ZULKEFLI, MOHD GHAZALI AND ABDULL HAMID EMBONG FCJJ

9 FEBRUARY 2010

Constitutional Law — Executive — Dismissal of Chief Minister — Chief Minister ceasing to command confidence of majority members of State Legislative Assembly — Chief Minister's request for dissolution of State Assembly rejected by Sultan — Refusal of Chief Minister to tender resignation — Whether Chief Minister may be dismissed from office or Chief Minister's post be deemed vacant where Chief Minister refuses to tender resignation — Whether motion of no confidence required to dismiss Chief Minister — Whether dismissal of Chief Minister by Sultan effective — Laws of the Constitution of Perak art XVI(6)

Constitutional Law — Interpretation — Interpretation of constitution — Whether to be interpreted differently from ordinary statute — Organic theory — Whether provisions of constitution not to be separated and considered in isolation — Purposive approach

Constitutional Law — Legislature — State Assembly — Request to Sultan for dissolution of Perak State Assembly under art XVI(6) of the Laws of the Constitution of Perak — Sultan refusing consent for dissolution — Refusal of Chief Minister to tender resignation — Whether Chief Minister may be dismissed from office or Chief Minister's post be deemed vacant where Chief Minister refuses to tender resignation — Whether motion of no confidence required to dismiss Chief Minister — Whether dismissal of Chief Minister by Sultan effective — Laws of the Constitution of Perak art XVI(6)

Following the general election held on 8 March 2008, the political alliance called Pakatan Rakyat ('PR') won 31 seats out of the 59 seats in the State Legislative Assembly of Perak ('LA'). The remaining seats went to Barisan Nasional ('BN'). On 17 March 2008, the appellant was appointed the Chief Minister of Perak ('the CM') by His Royal Highness the Sultan of Perak ('HRH'). On 5 February 2009 three members of the LA declared and

informed HRH that they no longer supported the PR and instead threw their support behind BN. The appellant then had an audience with HRH on the same day where he was informed that his request for dissolution of the LA was rejected by HRH. He was then directed to tender the resignation of the executive council, as he no longer commanded the confidence of the majority of the members of the LA. The direction was made pursuant to art XVI(6) of the Laws of the Constitution of Perak ('the State Constitution'). The appellant maintained that the request for dissolution was made under art XXXVI(2), while the respondent maintained that it was made under art XVI(6). The appellant did not comply with the direction given by HRH. On 6 February 2009 HRH appointed the respondent as the new CM, replacing the appellant. Dissatisfied with the decision of HRH, the appellant filed an application for judicial review seeking, inter alia, the following reliefs: (i) a declaration that the appellant was still the CM; (ii) a declaration on the interpretation of art XVI(6); and (iii) a declaration that the respondent had no legal right to be CM. The appellant claimed that there had been no motion of no confidence against him in the LA and that he had not resigned from the post of CM. The High Court granted the declaration that the appellant at all material times was the CM and the writ of quo warranto was issued against the respondent. On appeal, the Court of Appeal reversed the decision of the High Court. The appellant was then granted leave to appeal to the Federal Court on the following questions: (a) whether, under art XVI(6) and in the circumstances that: (i) the CM wishes, and has advised for the dissolution of the LA; and (ii) there is no dissolution of the LA; and (iii) there is no motion of no confidence taken in and adopted by the LA against the CM; and (iv) there is no resignation by the CM; the post of the CM may be vacated; (b) whether, under art XVI(6), the determination of the issue of confidence in the CM has to be made by members of the LA in an assembly meeting on a vote of no confidence or by any other means as to whether the CM commands the confidence of the majority of the members of the LA?; and (c) if the CM refuses to tender the resignation of the executive council whether under the State Constitution, a CM may be dismissed from office or the CM's post be deemed vacant or vacated?

Held, dismissing the appeal:

(1) A Constitution being the supreme law of a State or Federation, has to be interpreted differently from ordinary statute. Our courts are inclined to the organic theory in the interpretation of the Constitution. No one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument (see paras 24 & 26–27).

(2) A request for dissolution under art XXXVI(2), unlike the request under art XVI(6), if rejected by HRH, would not trigger the consequence as provided in art XVI(6) ie the CM having to tender the resignation of the executive council. There was ample evidence that the appellant had requested for a dissolution of the LA on the ground that he had lost the confidence of the majority of the members of the LA. The request was made under art XVI(6) (see paras 31 & 37).

(3) There is nothing in art XVI(6) or in any other provisions of the State Constitution stipulating that the loss of confidence in the CM may only be established through a vote in the LA. Evidence of loss of confidence in the CM may be gathered from other extraneous sources provided, they are properly established. Such sources, should include the admission by the CM himself and/or representations made by members of the LA that the CM no longer enjoys the support of the majority of the members of the LA. There was evidence of such admission by the appellant himself and from the demonstration of support by the 31 members of the LA for BN. Hence, giving BN a clear majority in the LA. All these clearly pointed to the loss of confidence of the majority of the members of the LA in the leadership of the appellant as the CM (see para 48).

(4) It was incumbent upon the appellant in the circumstances of this case to tender the resignation of the executive council. The term executive council by definition includes the CM. The appellant's refusal to resign after having been directed to do so by HRH clearly went against the express provisions of art XVI(6) (see para 55).

(5) The first question was answered in the affirmative; as for the second question, under art XVI(6) the question of confidence in the CM may be determined by means other than a vote of no confidence in the LA; and as for the third question, if the CM refuses to tender the resignation of the executive council under art XVI(6) the CM and the executive council members are deemed to have vacated their respective offices (see para 56).

[Bahasa Malaysia summary

Berikutan pilihan raya umum yang diadakan pada 8 Mac 2006, perikatan politik yang kenali sebagai Pakatan Rakyat ('PR') telah memenangi 31 kerusi daripada 59 kerusi di Dewan Undangan Negeri Perak ('DU'). Baki kerusi telah dimenangi oleh Barisan Nasional ('BN'). Pada 17 Mac 2008, perayu telah dilantik sebagai Menteri Besar Perak ('MB') oleh DYMM Tuanku Sultan Perak ('DYMM Tuanku'). Pada 5 Februari 2009 tiga ahli DU telah mengumumkan dan memberitahu DYMM Tuanku bahawa mereka tidak lagi menyokong PR dan sebaliknya menyokong BN. Perayu kemudian telah

menghadap DYMM Tuanku pada hari yang sama dan diberitahu bahawa permohonannya untuk membubarkan DU telah ditolak oleh DYMM Tuanku. Dia kemudian telah diarahkan untuk mengemukakan peletakan jawatan dalam majlis mesyuarat, oleh kerana dia tidak lagi memegang keyakinan majoriti ahli-ahli DU. Arahan itu telah dibuat menurut perkara XVI(6) Undang-Undang Tubuh Kerajaan Perak ('Undang-Undang Tubuh Kerajaan'). Perayu mempertahankan bahawa permohonan untuk pembubaran telah dibuat di bawah perkara XXXVI(2) manakala responden mempertahankan bahawa ia telah dibuat di bawah perkara XVI(6). Perayu tidak mematuhi arahan yang diberikan oleh DYMM Tuanku. Pada 6 Februari 2009 DYMM Tuanku telah melantik responden sebagai MB baru untuk menggantikan perayu. Berasa tidak puas hati dengan keputusan DYMM Tuanku, perayu telah memfailkan permohonan untuk semakan kehakiman memohon, antara lain, relief-relief berikut: (i) deklarasi bahawa perayu masih MB; (ii) deklarasi tentang pentafsiran perkara XVI(6); dan (iii) deklarasi bahawa responden tidak hak yang sah untuk menjadi MB. Perayu mendakwa bahawa tiada usul tak percaya terhadapnya dalam DU dan bahawa dia tidak meletak jawatan daripada jawatan MB. Mahkamah Tinggi telah memberikan deklarasi bahawa perayu pada setiap masa matan adalah MB dan writ quo warranto telah dikeluarkan terhadap responden. Semasa rayuan, Mahkamah Rayuan telah mengakas keputusan Mahkamah Tinggi. Perayu kemudian telah memberikan kebenaran merayu ke Mahkamah Persekutuan berdasarkan persoalan-persoalan berikut: (a) sama ada, di bawah perkara XVI(6) dan dalam keadaan tersebut bahawa: (i) MB ingin, dan telah menasihatkan agar diadakan pembubaran DU; dan (ii) tiada pembubaran DU; dan (iv) tiada peletakan jawatan oleh MB tersebut; jawatan MB mungkin kosong; (b) sama ada, di bawah perkara XVI(6), penentuan isu keyakinan terhadap MB tersebut telah dilakukan oleh ahli-ahli DU dalam mesyuarat Dewan Undangan atas undi tak percaya atau melalui apa-apa sebab lain tentang sama ada MB memegang kepercayaan majoriti ahli-ahli DU; dan (c) jika MB enggan mengemukakan peletakan jawatan dalam majlis mesyuarat sama ada di bawah Undang-Undang Tubuh Kerajaan, seorang MB boleh dipecat daripada jawatan atau jawatan MB dianggap kosong atau dikosongkan?

Diputuskan, menolak rayuan:

(1) Perlembagaan yang merupakan undang-undang tertinggi Kerajaan atau Persekutuan, perlu ditafsirkan berbeza daripada perundangan statut. Mahkamah di Malaysia lebih cenderung kepada teori organik dalam pentafsiran Perlembagaan. Tiada satu perundangan Perlembagaan boleh dipisahkan daripada yang lain, dan dianggap hanya satu, tetapi semua

peruntukan yang mengandungi perkara tertentu perlu dikemukakan dan ditafsirkan agar memberi kesan kepada tujuan instrument tersebut (lihat perenggan 24 & 26–27).

(2) Permohonan untuk pembubaran di bawah perkara XXXVI(2), tidak seperti permohonan di bawah perkara XVI(6), jika ditolak oleh DYMM Tuanku, tidak akan mencetuskan akibat sepertimana diperuntukkan dalam perkara XVI(6) iaitu MB tersebut perlu mengemukakan peletakan jawatan dalam majlis mesyuarat. Terdapat keterangan mencukupi bahawa perayu telah memohon untuk pembubaran DU atas alasan bahawa dia telah hilang keyakinan majoriti ahli-ahli DU. Permohonan itu telah dibuat di bawah perkara XVI(6) (lihat perenggan 31 & 37).

(3) Tiada apa-apa dalam perkara XVI(6) atau dalam mana-mana peruntukan lain Undang-Undang Tubuh Kerajaan yang menetapkan bahawa hilang keyakinan terhadap MB hanya boleh dibuktikan melalui undian dalam DU. Keterangan hilang keyakinan terhadap MB boleh dikumpulkan daripada sumber-sumber luar yang lain dengan syarat, ia dibuktikan sewajarnya. Sumber-sumber tersebut, hendaklah termasuk pengakuan oleh MB sendiri dan/atau representasi yang dibuat oleh ahli-ahli DU bahawa MB tidak lagi menikmati sokongan majoriti ahli-ahli DU. Terdapat keterangan tentang pengakuan sedemikian oleh perayu sendiri dan daripada pembuktian sokongan oleh 31 ahli DU dari BN. Justeru itu, memberikan BN kemenangan majoriti dalam DU. Kesemua ini jelas menunjukkan hilang keyakinan daripada majoriti ahli-ahli DU di bawah kepimpinan perayu sebagai MB (lihat perenggan 48).

(4) Dalam keadaan kes ini perayu wajib mengemukakan peletakan jawatan dalam majlis mesyuarat. Istilah majlis mesyuarat mengikut definisi termasuklah MB. Keengganan perayu meletak jawatan setelah diarahkan berbuat sedemikian oleh DYMM Tuanku jelas melanggar peruntukan nyata perkara XVI(6) (lihat perenggan 55).

(5) Persoalan pertama telah dijawab secara positif; untuk persoalan kedua, di bawah perkara XVI(6) persoalan tentang keyakinan terhadap MB boleh ditentukan dengan cara selain daripada undian tak percaya dalam DU tersebut; dan untuk persoalan ketiga, jika MB enggan mengemukakan peletakan jawatan dalam majlis mesyuarat di bawah perkara XVI(6) MB dan ahli-ahli majlis mesyuarat dianggap telah mengosongkan jawatan masing-masing (lihat perenggan 56).]

Notes

For a case on dismissal of Chief Minister, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1987.

For a case on State Assembly, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2249.

For cases on interpretation in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2186–2188.

Cases referred to

Adegbenro v Akintola & Anor [1963] 3 All ER 544, PC (folld)

Coutts v Commonwealth Of Australia (1985) 59 ALR 699, HC (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257, FC (refd)

Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, Intervener) [2009] 5 MLJ 464; [2009] 5 CLJ 265; [2009] 4 AMR 569, CA (refd)

Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak Yang Di-Pertua Negeri Sabah & Ors [1995] 1 MLJ 169; [1995] 1 CLJ 184, HC (distd)

Datuk Harun bin Hj Idris v Officer-In-Charge, Pudu Prison [1981] 2 MLJ 72, FC (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697, SC (folld)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Gulf Insurance Ltd v The Central Bank of Trinidad and Tobago No 8 of 2002, PC (refd)

Hinds & Ors v The Queen; Director of Public Prosecutions v Jackson Attorney General of Jamaica (intervener) [1976] 1 All ER 353, PC (folld)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Liyanage & Ors v R [1966] 1 All ER 650, PC (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)

London & Clydeside Estate Ltd v Aberdeen District Council & Anor [1980] 1 WLR 182, HL (refd)

Mahabir Chandra Prasad Sharma, Petitioner v Prafulla Chandra Ghosh & Ors, Respondents AIR 1960 Cal 198 (refd)

Minister of Home Affairs v Fisher [1979] 3 All ER 21, PC (folld)

Perwira Affin Bank Bhd v Tan Ah Tong [2003] 5 MLJ 193, HC (refd)

Pow Hing & Anor v Registrar of Titles, Malacca [1981] 1 MLJ 155, FC (refd)

PP v Chang Han Yuan [1999] 4 MLJ 49, HC (refd)

PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (refd)

SOP Plantations (Suai) Sdn Bhd v Ading AK Layang & Ors [2004] 4 MLJ 180, HC (refd)

Stephen Kalong Ningkan v Tun Abang Hj Openg and Tawi Sli [1966] 2 MLJ 187, HC (folld)

Teh Cheng Poh v PP [1979] 1 MLJ 50, PCA (refd)

A *Tun Datu Hj Mustapha bin Datu Harun v Tun Datu Hj Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420, HC (refd)

Watt (or Thomas) v Thomas [1947] AC 484, HL (refd)

B **Legislation referred to**

Laws of the Constitution of Perak arts 6(3), 7(1), XVI(2), XVI(2)(a), (b), XVI(6), XVIII(2)(b), XXXVI(2)

Constitution of India [IND] art 164(2)

C **Appeal from**: Civil Appeal No W-01–112 of 2009 (Court of Appeal, Putrajaya)

Sulaiman Abdullah (Ambiga Sreenevasan, Nga Hock Cheh, Philip Koh Tong Ngee, Chan Kok Keong, Ranjit Singh, Razlan Hadri bin Zulkifli, Mohamed Hanipa bin Maidin, Leong Cheok Keng, Edmund Bon Tai Soon, Amer
D *Hamzah bin Arshad, Zulqarnain bin Lukman and Joanne Leong Pooi Yaen with him) (Leong & Tan) for the appellants.*

Cecil Abraham (Sunil Abraham and Farah Shuhadah Razali with him) (Zul Rafique & Partners) for the respondent.

Abdul Gani Patail (Tun Abd Majid Tun Hamzah, Kamaludin bin Md Said,
E *Azizah Nawawi, Amarjeet Singh, Suzana bt Atan and Andi Razali Jaya bin A Dadi with him) (Attorney General's Chambers) for the intervener.*

Cheng Poh Heng watching brief for the Malaysian Bar.

M Reza Hassan watching brief for Barisan Nasional.

F **Arifin Zakaria CJ (Malaya):**

INTRODUCTION

[1] Following the general election held on 8 March 2008, the political
G alliance called Pakatan Rakyat ('PR') won 31 seats out of the 59 seats in the State Legislative Assembly of Perak ('LA'). The remaining seats went to Barisan Nasional ('BN'). On 17 March 2008, the appellant was appointed the Menteri Besar of Perak ('the MB') by His Royal Highness the Sultan of Perak ('HRH'). On 5 February 2009 three members of the LA for Behrang,
H Changkat Jering and Jelapang declared and informed HRH that they no longer supported the PR and instead threw their support behind BN. The appellant then had an audience with HRH on the same day where he was informed that his request for dissolution of the LA was rejected by HRH. He was then directed to tender the resignation of the executive council, as he no
I longer commands the confidence of the majority of the members of the LA. The direction was made pursuant to art XVI(6) of the Laws of the Constitution of Perak ('the State Constitution'). The appellant did not comply with the direction given by HRH. On 6 February 2009 HRH appointed the respondent as the new MB, replacing the appellant.

[2] Dissatisfied with the decision of HRH, the appellant filed an application for judicial review seeking the following reliefs: A

(a) A declaration that the appellant is still the MB of Perak;

(b) A declaration on the Interpretation of art XVI(6) of the Undang-Undang Tubuh Kerajaan Negeri Perak that in the circumstances where: B

(i) the MB wanted, and had given advice to dissolve the Perak Legislative Assembly ('LA'); C

(ii) the LA was not dissolved;

(iii) there was no motion of no confidence against the MB in the LA; and

(iv) there is no resignation from the post of MB, D

whether the office of the MB Perak falls vacant or has been vacated.

(c) A writ of 'quo warranto' be issued against the respondent to show cause and to give information how and under what authority can/is the respondent act as the MB of Perak; E

(d) A declaration that the respondent has no legal right to be MB;

(e) An injunction to stop the respondent and/or agents from acting as the MB; and

(f) Damages (punitive, aggravated and exemplary). F

Prayers (g), (h) and (i) were withdrawn at the end of the hearing before the High Court.

[3] The High Court granted the declaration that the appellant at all material times was and is the MB and the writ of quo warranto was issued against the respondent. On appeal to the Court of Appeal, the decision of the learned High Court judge was reversed. G

[4] On 9 July 2009, this court allowed the appellant's application for leave to appeal to this court against the decision of the Court of Appeal on the following questions: H

(a) Whether, under art XVI(6) of the Laws of the Constitution of Perak and in the circumstances that: I

(i) the Menteri Besar of Perak wishes, and has advised for the dissolution of the Perak State Legislative Assembly; and

(ii) there was no dissolution of the Perak State Legislative Assembly; and

(iii) there was no motion of no confidence taken in and adopted by the Perak State Legislative Assembly against the Menteri Besar of Perak; and

(iv) there was no resignation by the Menteri Besar of Perak;

the post of the Menteri Besar of Perak may be and/or has been vacated.

(b) Whether, under art XVI(6) of the Laws of the Constitution of Perak, the determination of the issue of confidence in the Menteri Besar of Perak has to be made by members of the Perak State Legislative Assembly in an assembly meeting on a vote of no confidence, or by means other than by a vote of no confidence in the Perak State Legislative Assembly as to whether the Menteri Besar commands the confidence of the majority of the members of the Perak State Legislative Assembly?

(c) If the Menteri Besar refuses to tender the resignation of the executive council whether under the Laws of the Constitution of Perak, a Menteri Besar may be dismissed from office or the Menteri Besar's post be deemed vacant or vacated.

EVENTS LEADING TO THE APPOINTMENT OF THE RESPONDENT

[5] In considering the issues posed to us it is necessary to narrate in some detail the events leading to the appointment of the respondent as the MB, replacing the appellant. Chronogically they are as follows:

(a) On 30 January 2009, by separate letters addressed to the LA Speaker ('Speaker'), two members of the LA namely, Encik Jamaluddin bin Mohd Radzi (member of the LA for Behrang) and Encik Mohd Osman bin Mohd Jailu (member of the LA for Changkat Jering) purportedly resigned from their posts effective on the same day. On 1 February 2009, there was an announcement over the media by the Speaker to that effect.

(b) On the same day, the Speaker informed the Election Commission ('EC') of the purported resignation.

(c) Following the media announcement, on 1 February 2009, Encik Jamaluddin bin Mohd Radzi and Encik Mohd Osman bin Mohd Jailu sent separate letters dated the same day to the HRH stating, inter alia, that:

(i) They did not issue the letter of resignation as alleged by the Speaker in his press statement; and

(ii) They are still serving and carrying out their duties as the assemblymen for Behrang and Changkat Jering respectively. On the same day, they issued a letter to the Speaker stating, inter alia, that:

(A) Any letter and/or notice purporting to contain their resignation as members of the LA whether dated before, on or after 1 February 2009 is invalid ab initio due to non-occurrence of an event;

(B) At all material time, they have not tendered their resignation letter to the Speaker as alleged;

(C) The purported resignation letter was not dated by them and the act of such person in inserting the date on the purported resignation letter was done without their prior approval and/or consent; and

(D) That they are issuing the letters dated 1 February 2009 voluntarily and on their own accord.

[6] The abovementioned letters dated 1 February 2009 were also copied to the State Secretary of Perak, the State Legal Adviser of Perak, the secretary of the LA and the director of elections for the State of Perak.

[7] Both of them also issued a letter to the director of elections for the State of Perak stating, inter alia, as follows:

(a) any letter and/or notice purporting to contain their resignation as members of the Perak LA whether dated before, on or after 1 February 2009 is invalid ab initio due to non-occurrence of an event; and

(b) they also enclosed a copy of their letters to the Speaker.

[8] On 2 February 2009, the Behrang assemblyman lodged a police report at the Bentong Police Station (Report No 000583/09) stating, inter alia, that:

(a) he did not tender the purported resignation letter to the Speaker;

(b) at all material time, he was on medical leave; and

(c) the purported resignation letter is invalid, fraudulent and issued in bad faith.

[9] On 2 February 2009, one Mohd Farizal bin Omar on behalf of the Changkat Jering assemblyman lodged a separate police report at the Shah Alam Police Station (Report No 000582/09) to the same effect.

[10] On the same day, the appellant, who was then the Menteri Besar of Perak, had an audience with HRH to inform HRH of the purported resignations of the Behrang and Changkat Jering assemblymen.

[11] On 3 February 2009, both the Behrang and Changkat Jering assemblymen wrote to HRH informing HRH that they:

(a) have lost their confidence in the appellant;

(b) will not support him as the MB; and

(c) the BN alliance now has a majority in the LA.

[12] Both the Behrang and Changkat Jering assemblymen who at that time were still members of Parti Keadilan Rakyat ('PKR') wrote a letter dated 3 February 2009 respectively to the President of PKR and the Speaker stating that:

(a) they have lost their confidence in PKR;

(b) they are leaving PKR and denouncing their membership as members of PKR effective immediately;

(c) their declaration leaving PKR does not operate as their resignation as members of the LA; and

(d) any letter and/or notice purporting to contain their resignation as members of the LA whether dated before, on or after 1 February 2009 is invalid ab initio.

[13] By letter dated 3 February 2009 addressed to the Speaker, another member of the LA, namely, Madam Hee Yit Foong (member of the LA for Jelapang) purportedly resigned as a member of the LA effective on the same day.

[14] The Jelapang assemblywoman issued a letter on the same date to the Speaker stating, inter alia, that:

(a) any letter or notice of resignation purporting to be her resignation as a member of the LA and which does not bear her official stamp is void ab initio;

(b) she has lost her confidence in the Democratic Action Party ('DAP');

(c) she is leaving the political party and denouncing her membership in the DAP; and

(d) her declaration on leaving the DAP does not operate as her resignation as a member of the LA.

[15] The Jelapang assemblywoman also issued a letter dated 3 February 2009 to the secretary of the DAP reiterating the content of her letter to the Speaker.

[16] On 3 February 2009, the Jelapang assemblywoman wrote to HRH to inform HRH that she:

(a) has lost her confidence in the appellant;

(b) will not support him as the MB; and

(c) the Barisan Nasional alliance now has the support of the majority of the members of the LA.

[17] On 4 February 2009, at about 3pm, HRH received three separate letters from:

(a) the Jelapang assemblywoman;

(b) the Behrang assemblyman; and

(c) the Changkat Jering assemblyman.

The letters expressed their support for BN and that they had lost confidence in the appellant and that they were leaving their respective political parties but maintaining their position as members of the LA.

[18] At about 5pm on 4 February 2009, the appellant had an audience with HRH. During the audience, it was alleged, that he had requested for dissolution of the LA. HRH, in the presence of the Perak State Legal Adviser, informed the appellant that HRH would have to consider his request. On 5 February 2009, the appellant wrote to HRH informing HRH of the latest development in the state and once again requested HRH to dissolve the LA. At about 10am on the same day, the then Deputy Prime Minister Dato' Seri Mohd Najib bin Tun Abd Razak, in his capacity as the chairman of the Perak BN, had an audience with HRH.

[19] At this meeting, the Deputy Prime Minister presented HRH with a letter of support from the 28 members of the LA who are aligned to the BN and that of the Behrang and Changkat Jering assemblymen and Jelapang assemblywoman. The letter stated that the signatories will support whoever that will be named by YAB Dato' Seri Mohd Najib bin Tun Abdul Razak as the candidate for the new MB.

[20] On 5 February 2009 at about 11.15am, the then Deputy Prime Minister brought in all 31 members of the LA including Encik Jamaluddin

bin Mohd Radzi, Encik Mohd Osman bin Mohd Jailu and Madam Hee Yit Foong to Istana Kinta to meet with HRH. All 31 members of the Perak LA pledged their support to the BN.

[21] Thereafter, HRH spoke to the Jelapang assemblywoman, the Behrang assemblyman, the Changkat Jering assemblyman and also Encik Nasaruddin, the Bota assemblyman. All four members of the LA stated that they signed the letters wherein they have pledged their support to the BN voluntarily without any coercion from any other party. At about 1pm on 5 February 2009, the appellant had an audience with HRH in the meeting room at Istana Kinta. At about 1.20pm, the appellant left the meeting room.

[22] At about 2.16pm, HRH's office issued a press statement to Bernama, the material part of which reads as follows:

> Yang Amat Berhormat Dato' Seri Ir Haji Mohammad Nizar bin Jamaluddin telah manghadap Duli Yang Maha Mulia Paduka Seri Sultan Perak Darul Ridzuan pada 04 Februari 2009 (semalam) memohon perkenan Baginda untuk membubarkan Dewan Negeri Perak.
>
> Yang Amat Berhormat Dato' Seri Mohd Najib, Timbalan Perdana Menteri Malaysia juga memohon menghadap Baginda atas kepasitinya sebagai Pengerusi Barisan Nasional Negeri Perak dan telah diberi perkenan menghadap Baginda pada esuk harinya, pagi 05 Februari 2009.
>
> Yang Amat Berhormat Dato' Seri Mohd Najib memaklumkan bahawa Barisan Nasional dan penyokong-penyokongnya kini yang terdiri daripada 31 orang ahli Dewan Negeri telah menguasai majoriti di kalangan ahli-ahli Dewan Negeri.
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> Atas titah Duli Yang Maha Mulia untuk meyakinkan Baginda bahawa maklumat yang dipersembahkan itu adalah tepat, kesemua 31 orang ahli Dewan Negeri tersebut telah dititah menghadap Paduka Seri Sultan.
>
> Setelah menemui sendiri kesemua 31 ahli-ahli Dewan tersebut, DYMM Paduka Seri Sultan Perak telah yakin bahawa YAB Dato' Seri Ir Haji Mohammad Nizar bin Jamaluddin telah terhenti daripada mendapat kepercayaan sebahagian besar (ceases to command the confidence of the majority) dari kalangan ahli-ahli Dewan Negeri.
>
> DYMM Paduka Seri Sultan Perak juga telah menimbangkan dengan sedalam-dalamnya permohonan YAB Dato' Seri Ir Haji Mohammad Nizar bin Jamaluddin pada 04 Februari 2009 memohon perkenan Baginda untuk membubarkan Dewan Negeri Perak. Baginda menggunakan budi bicara Baginda di bawah Perkara XVIII (2)(b) Undang-Undang Tubuh Kerajaan Perak Darul Ridzuan dan tidak berkenan membubarkan Dewan Negeri Perak.
>
> YAB Dato' Seri Ir Haji Mohammad Nizar bin Jamaluddin telah dititah menghadap Baginda untuk dimaklumkan mengenai keputusan Baginda tidak membubarkan Dewan dan selaras dengan peruntukan XVI(6) Undang-Undang Tubuh Kerajaan Perak Darul Ridzuan, DYMM Paduka Seri Sultan Perak menitahkan YAB Dato' Seri Ir Haji Mohammad Nizar bin Jamaluddin meletak jawatan sebagai Menteri Besar Perak bersama ahli-ahli Majlis Mesyuarat Kerajaan (MMK) berkuat kuasa serta merta.

> Sekiranya YAB Dato' Seri Ir Mohammad Nizar bin Jamaluddin tidak meletak jawatan sebagai Menteri Besar Perak bersama ahli-ahli MMK, maka jawatan Menteri Besar serta ahli-ahli MMK tersebut dianggap telah dikosongkan.

[23] By this statement, it was made known that HRH had turned down the request by the appellant to dissolve the LA under art XVI(6) and as a consequence the appellant was required to tender his resignation together with his executive council members. Since the appellant failed to do so, therefore, the offices of MB together with the executive council members were deemed to have been vacated.

PRINCIPLES APPLICABLE TO THE INTERPRETATION OF A CONSTITUTION

[24] The answers to the questions posed to us turn essentially on the construction to be accorded to the relevant provisions of the State Constitution. We have been reminded by learned counsel for the parties as to the principles to be adopted in the interpretation of the Constitution. Basically, a Constitution being the supreme law of a State or Federation, it has to be interpreted differently from ordinary statute. The Privy Council in *Hinds & Ors v The Queen; Director of Public Prosecutions v Jackson Attorney General of Jamaica (intervener)* [1976] 1 All ER 353 said:

> To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would … be misleading.

(See also *Liyanage & Ors v Regina* [1966] 1 All ER 650).

[25] In *Minister of Home Affairs v Fisher* [1979] 3 All ER 21, the Privy Council was faced with interpreting the fundamental rights provisions of the Bermuda Constitution. It concluded by saying that these provisions 'call for a generous interpretation avoiding the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental rights and freedom' (see also *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50) and this court in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 at p 709 stated:

> Secondly, as the judicial committee of the Privy Council held in *Minister of Home Affairs v Fisher* at p 329, a constitution should be construed with less rigidity and more generosity than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.

In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in *Attorney General of the Commonwealth, ex relatione McKinley v Commonwealth of Australia* at p 17:

> The only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

[26] NS Bindra's *Interpretation of Statutes*, (10th Ed) at p 1295 speaks of two theories of interpretation of Constitution namely, the mechanical and organic theories. At p 1296 it stated that the organic method is to be preferred. 'The organic method requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties'. From the authorities cited above our courts are inclined to the organic theory in the interpretation of the Constitution.

[27] One other important guide in interpretation of Constitution is that, 'The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous'.

(See *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257).

THE FIRST AND SECOND QUESTIONS

[28] Guided by the abovestated principles on constitutional interpretation we will now endeavour to construe the relevant provisions of the State Constitution which are germane to the issues in the present case. The statement issued out of HRH's office dated 5 February 2009 sets out the premise on which HRH had decided to appoint the respondent as the MB replacing the appellant.

[29] The issue is whether HRH had acted within his authority in so doing. The answer to this question lies on the construction to be given to art XVI(6) of the State Constitution which states:

The Executive Council

(6) If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.

This article contemplates a situation where the MB ceases to command the confidence of the majority of the members of the LA. In such a circumstance he may request for the dissolution of the LA so that a fresh election can be held. Such a request must be addressed to HRH, but in the event HRH rejected his request for the dissolution of the LA then he shall tender the resignation of the executive council. By definition 'executive council' consists of the MB appointed by HRH under art XVI(2)(a) and other members of the executive council appointed under art XVI(2)(b).

[30] It is not in dispute that the appellant did approach HRH for dissolution of the LA, but the issue is whether the request for dissolution was made under art XVI(6) or under art XXXVI(2). The appellant maintained that it was made under art XXXVI(2), while the respondent, through the evidence of the state legal adviser and documentary evidence tendered before the court, maintained that it was made under art XVI(6).

[31] The learned High Court judge, disbelieved the state legal adviser on this issue and found for the appellant. This issue arose because of the common stand taken by the parties that a request for dissolution under art XXXVI(2), unlike the request under art XVI(6), if rejected by HRH, would not trigger the consequence as provided in art XVI(6) ie the MB having to tender the resignation of the executive council.

[32] The Court of Appeal reversed the finding of the learned High Court judge on the premise that his finding was perverse, being contrary to documentary and other evidence before the court (see *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, Intervener)* [2009] 5 MLJ 464; [2009] 5 CLJ 265; [2009] 4 AMR 569. Raus JCA (as he then was) his judgment stated:

26 It is clear from the above uncontroverted documentary evidence that the request for the dissolution of the Legislative Assembly must have been made under art XVI(6) of the Perak State Constitution. Moreover, state of events that led to the decision of His Royal Highness not to dissolve the Legislative Assembly, does not support Nizar's claim that he had requested the dissolution of the Legislative Assembly under art XXXVI(2) of the Perak State Constitution.

27 It is an undisputed fact that the Pakatan Rakyat Government at its formation had a three seat majority in the Legislative Assembly. Thus, when the two assemblymen of Pakatan Rakyat from PKR on 1 February 2009 declared that they were leaving the party and crossing support to the Barisan Nasional, Nizar must be concerned of his position. Nizar quickly had an audience with His Royal Highness on 2 February 2009, to inform His Royal Highness that the two assemblymen had in fact resigned. But by that time the two assemblymen had openly disputed the fact they have resigned as members of the Legislative Assembly.

28 On 3 February 2009, another bombshell hit Nizar. This time an assemblywoman from DAP announced her decision to leave DAP, a political party aligned to Pakatan Rakyat. She too had disputed the claim by the Speaker that she had resigned as a member of the Legislative Assembly. She openly declared that she no longer supported Nizar as the Menteri Besar, instead she was supporting Barisan Nasional.

29 The above was the state of affairs when Nizar had an audience with His Royal Highness at 5.30pm on 4 February 2009, where he made the request to dissolve the Legislative Assembly. At that time he could not credibly dispute the fact that he had lost the support of the majority of the members of the Legislative Assembly as the Barisan Nasional consisting 28 members with the support of three independent members had a total of 31 members, while Pakatan Rakyat had 28 members. On these undisputed facts, how could he possibly claimed that his request to dissolve the Legislative Assembly was under art XXXVI(2) of the Perak State Constitution.

30 Article XXXVI(2) is a general provision. A request for dissolution under this article, have to be in relation to the conclusion of the five years term of the Legislative Assembly when a general election is contemplated. It is a well known fact that the general election had been held barely one year ago. Hence, the learned judge's finding that the request by Nizar for the dissolution of the Legislative Assembly was under art XXXVI(2) cannot be supported. On the facts of this case, the request could only have been made in accordance to art XVI(6) of the Perak State Constitution.

[33] Having considered the evidence before the court, we find that the Court of Appeal was justified in reversing the finding of facts by the learned High Court judge. We agree that this is a clear case where the trial judge failed to judicially appreciate the evidence before him. Such a failure justifies an appellate intervention as was rightly done by the Court of Appeal in the present case (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor*

[2003] 2 MLJ 97; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; *Watt (or Thomas) v Thomas* [1947] AC 484; *Gulf Insurance Ltd v The Central Bank of Trinidad and Tobago* No 8 of 2002, 9 March 2005, Privy Council, Transcript).

[34] In this regard we would, however, add that the power to dissolve the LA is vested in HRH by art XXXVI(2) no matter in what circumstances it was made. This is clear from our reading of the said article which provides:

> (2) His Royal Highness may prorogue or dissolve the Legislative Assembly.

This is the only provision touching on the dissolution of the LA. Article XVI(6), in our view, does not provide for the dissolution of the LA as such, but merely provides that the MB may in the circumstances stated in art XVI(6) request HRH for the dissolution of the LA. It does not confer the power on HRH to dissolve the LA. So in the event HRH accedes to the request for the dissolution of the LA it has to be done under XXXVI(2) not under art XVI(6). As we see it art XXXVI(2) is a general power to dissolve the LA, but the circumstances under which the LA may be dissolved are varied, and one such circumstance is when there is a request by the MB to do so under art XVI(6) and HRH agrees to such a request. Other instances that we can think of, is where the government of the day may request for the dissolution of the LA prior to expiry of the five year term in order to get a fresh mandate from the electorate. It is important to note that in all cases, the decision whether or not to dissolve the LA is in the absolute discretion of HRH. HRH does not act on advice of the executive council in the matter of dissolution of the LA. This is clearly stated in art XVIII(2)(6).

[35] What had happened here, as found by the Court of Appeal, was that the appellant had requested HRH for dissolution of the LA, on the ground that he no longer commands the confidence of the majority of the members of the LA. HRH rejected his request and acting under art XVI(6). HRH directed the appellant to tender his resignation together with that of the executive council. Had the appellant complied with the direction that would have been the end of the matter.

[36] The appellant, however, took the stand that the issue of confidence can only be determined by a vote taken in the LA. Without such a vote, he was not obliged to resign as directed by HRH. Hence, he contended that HRH had acted outside HRH's constitutional authority or power when he directed the appellant to tender the resignation of the executive council. In other words, before an art XVI(6) situation can be triggered there must first be a vote of no confidence put before the LA, and in the event the LA voted

A against him, then and only then, can a request for a dissolution of the LA under art VXI(6) be made to HRH. In the present case, there was no such vote of no confidence against him. Therefore, the prerequisite of art XVI(6) had not been satisfied.

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[37] Learned counsel for the appellant contended that what had happened in the present case was that, the appellant had an audience with HRH where he requested for a dissolution of the LA under art XXXVI(2) in order to avoid a possible deadlock in the house. The request for the dissolution of the LA was thus made under art XXXVI(2) not under art XVI(6). Therefore, even if C HRH rejected his request he was not required to tender the resignation of the executive council. This is contrary to the finding made by the Court of Appeal which held that there was ample evidence (both oral and documentary) indicating that the appellant had in fact requested for a D dissolution of the LA on the ground that he had lost the confidence of the majority of the members of the LA. They held that the request was made under art XVI(6). The learned judges of the Court of Appeal in three separate judgments had considered this issue at some length before coming to their finding. After a careful examination of the evidence before us we are of the E view that the Court of Appeal was justified in coming to the said finding.

[38] Having said that, therefore, the only issue before us is whether art XVI(6) by its terms requires that the test of confidence in the MB could only be done on the floor of the LA and not otherwise. It was contended for F the appellant that, since the MB, after being appointed by HRH, was only answerable to the LA, the only way to determine whether he commands the support of the majority of the members or otherwise was to have the motion tabled in the LA. In the event a vote of no confidence was passed by the LA then HRH will have to decide whether to dissolve the LA or not. The G appellant drew support for this contention from the case of *Tun Datu Hj Mustapha bin Datu Harun v Tun Datu Hj Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420, which adopted the view expressed in *Stephen Kalong Ningkan v Tun Abang Hj Openg and Tawi Sli* [1966] 2 MLJ 187.

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[39] The respondent and the learned attorney general on the other hand submitted that *Ningkan*'s case should not be followed, as the decision was based on the peculiar facts as found by the learned judge in that case. Firstly, it was pointed out that the assembly was in session when the governor sacked I Ningkan. Secondly the letter addressed to the governor which was purportedly signed by 21 members of the assembly was questionable. In one case there was merely a chop, with no signature, against the name of the member of the assembly. Thirdly, two days before Ningkan was sacked, bills were passed by the assembly without opposition and no motion of no

confidence was introduced in the assembly. And fourthly, there was no request for dissolution of the assembly ever being made by Ningkan. A

[40] In the present case, they said, not only was there a request made by the appellant for the dissolution of the LA under art XVI(6), thus indicating a loss of confidence in the appellant by the majority of the members, this was further confirmed in the meeting between the 31 members of the LA and HRH. At that meeting the 31 members jointly expressed their support for BN. They contended that, on those facts, *Ningkan*'s case can be distinguished from the present case as was done by the Court of Appeal. B C

[41] The Privy Council case of *Adegbenro v Akintola & Anor* [1963] 3 All ER 544 was relied by the respondent and the learned attorney general in support of the proposition that the evidence that the MB ceases to command the confidence of members of the LA for the purposes of art XVI(6) may be gathered from other sources and are not confined to the votes taken in the LA provided that, that extraneous sources are properly established. *Akintola* was not followed by Harley Ag CJ (Borneo) in *Ningkan*. He held that on the provisions of the Sarawak Constitution a lack of confidence could only be demonstrated by a vote in the Council Negeri. He pointed to the distinguishing feature in the Nigerian Constitution in that the governor had the express power to assess the situation 'as it appeared to him'. Furthermore, in Nigeria it was not disputed that the governor had the express power to remove the premier if he no longer commands the support of the majority of the members of the House. D E F

[42] The respondent and the learned attorney general also drew support from the case of *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak Yang Di-Pertua Negeri Sabah & Ors* [1995] 1 MLJ 169; [1995] 1 CLJ 184. In *Amir Kahar*, the plaintiff was a Cabinet Minister in the Cabinet led by Datuk Pairin Kitingan, as the Chief Minister. Following the exodus of PBS assemblymen to BN, Pairin Kitingan tendered his resignation as Chief Minister. A new Chief Minister was appointed together with a new cabinet. The plaintiff challenged the legality of the new government and sought for a declaration that the resignation of Pairin Kitingan, being personal in nature, had not affected his Cabinet and the plaintiff's position as State Minister. The primary issue that arose was whether the resignation of Pairin Kitingan was constitutionally proper and effective, and if so, whether that resignation in law amounted to the resignation of his whole Cabinet. It was held, inter alia, that even if the Chief Minister, under those circumstances, refused or did not tender the resignation of the members of the Cabinet, or if he tendered the resignation of himself alone, the fact remained that the Cabinet was dissolved on account of his losing the confidence of a majority of the members of the assembly. Following *Akintola* G H I

the court held further that the evidence that a Chief Minister ceased to command the confidence of the majority members of the assembly for the purpose of art 7(1) of the Constitution was not only available from the votes taken in the assembly. The learned judge noted that there was nothing in the Constitution which could be construed as requiring that the test of confidence must be by a vote taken in the assembly itself. That fact could also be evidenced by other extraneous sources. In that case the extraneous source was to be found in the clear expression contained in the petition by the 30 assemblymen to the first defendant and the admission of that fact by Datuk Pairin himself. This clear expression, the learned judge held, sufficed for the first defendant to exercise his discretion under art 6(3) to appoint the second defendant as the new Chief Minister.

[43] Abdul Kadir Sulaiman J (as he then was) at p 196 stated:

> In the circumstances I would adopt the dicta of Viscount Radcliffe who delivered the judgment of the Privy Council in *Adegbenro v Akintola & Anor*'s case at p 70 when His Lordship says:
>
> > What, then, is the meaning of the words 'the Premier no longer commands the support of a majority of the members? It has been said, and said truly, that the phrase is derived from the constitutional understandings that support the unwritten, or rather partly unwritten, Constitution of the United Kingdom. It recognises the basic assumption of that Constitution, as it has been developed, that, so long as the elected House of the Representatives is in being, a majority of the members who are prepared to act together with some cohesion is entitled to determine the effective leadership of the government of the day. It recognises also one other principle that has come to be accepted in the United Kingdom that, subject to questions as to the right of dissolution and appeal to the electorate, a Prime Minister ought not to remain in office as such once it has been established that he has ceased to command the support of a majority of the House. But, when that is said, the practical application of these principles to a given situation, if it arose in the United Kingdom, would depend less upon any simple statement of principle than upon the actual facts of that situation and the good sense and political sensitivity of the main actors called upon to take part.
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> > It is said, too, that the 'support' that is to be considered is nothing else than support in the proceedings of the House itself, and with this proposition also Their Lordships are in agreement. They do not think however, that this is in itself a very pregnant observation. No doubt, everything comes back in the end to the question what action the members of a part or a group or a combination are resolved to take in proceedings on the floor of the House; but in democratic politics speeches or writings outside the House, party meetings, speeches or activities in the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called upon to vote in the House, and it appears to Their Lordship somewhat unreal to try to draw a firm dividing line between votes and other demonstrations where the issue of 'support' is concerned.

Based on what was said by Viscount Radcliffe in the case, the evidence that a Chief Minister ceases to command the confidence of the majority of members of the assembly for the purpose of art 7(1) of the Sabah Constitution, may be found from other extraneous sources than to be confined to the votes taken in the Legislative Assembly provided that, that extraneous sources are properly established. In this case, that extraneous source is to be found in the clear expression contained in the petition by the 30 members to the first defendant and the admission of that fact by Datuk Pairin. This clear expression suffices for the first defendant to exercise his discretion under art 6(3) to appoint the second defendant as the new Chief Minister to replace Datuk Pairin which issue in any event is not contested by the plaintiff. The expression of lost of confidence is not, therefore, confined to a vote taken in the assembly but depending on the circumstances, which are capable of contributing sufficient evidence to indicate such lack of confidence. After all there is nothing in the Constitution of Sabah which can be construed as requiring that the test of confidence or the lack of it must be by way of a vote taken in the assembly itself.

[44] In *Amir Kahar*, even though the learned judge distinguished that case on its facts from *Ningkan*, he explicitly stated that the question whether the Chief Minister ceases to have the support of the majority of the members of the assembly could be gathered from sources outside the assembly. In this regard we would also refer to the Indian case of *Mahabir Chandra Prasad Sharma, Petitioner v Prafulla Chandra Ghosh & Ors, Respondents* AIR 1960 Cal 198. There, the High Court held that the governor may remove the Chief Minister from his office and dissolve the Council of Ministers headed by him after being satisfied that the Chief Minister no longer had the support of the majority of the Legislative Assembly. This was done without there being a vote of no confidence passed by the Legislative Assembly. In his judgment, BC Mitra J stated that the provision in cl (2) of art 164 of the India Constitution that the Ministers shall be collectively responsible to the Legislative Assembly of a state, does not in any manner fetter or restrict the governor's power 'to withdraw the pleasure' during which the Ministers hold office. It is true that there, the council of Ministers hold office at the pleasure of the governor but the point we are making is that the governor may remove the Chief Minister and the council of Ministers without a vote of no confidence being passed in the Legislative Assembly.

[45] The question is, which of these two contrasting stands is applicable to the present case. The answer to this depends wholly on the construction to be given to the relevant provisions of the State Constitution. In this regard it is important to bear in mind what was said by Raja Azlan Shah J (as His Royal Highness then was) in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at p 188:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied and this

A wording 'can never be overridden by the extraneous principles of other Constitutions' — see *Adegbenro v Akintola & Anor*. Each country frames its Constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences and from a desire to see how their progress and well being is ensured by their fundamental law.

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[46] Abdul Hamid Mohamad PCA (as he then was) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 similarly said, 'So, in determining the constitutionality or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a C political theory by some thinkers'. And as stated in the authorities referred to earlier, the interpretation of a Constitution calls for more generosity than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which had been employed. A Constitution is not to be D construed in any narrow or pedantic sense (see *Datuk Harun bin Hj Idris v Officer-In-Charge, Pudu Prison* [1981] 2 MLJ 72).

[47] Raus Sharif JCA (as he then was) agreed with the view expressed by Kadir Sulaiman J in *Amir Kahar* and stated that:

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> Similarly, in the present case there is nothing in the Perak State Constitution which can be construed as requiring that the test of confidence or lack of it must be by way of vote taken in the Legislative Assembly. Of course, actual voting in the Legislative Assembly is ideal but interpreting art XVI(6) to require the loss of F confidence to be established only by voting in the Legislative Assembly would lead to absurdity as the Menteri Besar who may have lost support will not be too eager to summon it. Thus, as rightly stated by Kadir Sulaiman J in *Amir Kahar* that there must be other circumstances, which are capable of contributing sufficient evidence to such lack of confidence in Chief Minister or the Menteri Besar.

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[48] We agree with the view stated above as there is nothing in art XVI(6) or in any other provisions of the State Constitution stipulating that the loss of confidence in the MB may only be established through a vote in the LA. As such, evidence of loss of confidence in the MB may be gathered from other H extraneous sources provided, as stated in *Akintola*, they are properly established. Such sources, we think, should include the admission by the MB himself and/or representations made by members of the LA that the MB no longer enjoys the support of the majority of the members of the LA. In the present case, the Court of Appeal held that there was evidence of such I admission by the appellant himself and what is beyond dispute is the demonstration of support by the 31 members of the LA for BN. Hence, giving BN a clear majority in the LA. All these clearly point to the loss of confidence of the majority of the members of the LA in the leadership of the appellant as the MB.

[49] For the above reasons our answer to the first question is in the affirmative and for the second question, is that there is no requirement in the State Constitution which requires a vote of no confidence to be tabled in the LA under art XVI(6).

THE THIRD QUESTION

[50] The third and final question posed to us is whether a MB who has been asked to resign by HRH under art XVI(6) may be dismissed from office or his office is deemed vacated if he refuses to resign. To recap art XVI(6) provides:

> (6) If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.

[51] From our reading of this article, it is plain that where a MB ceases to command the confidence of the majority of the members of the LA he may request HRH to dissolve the LA. This gives him the opportunity to obtain a fresh mandate from the electorate. The issue arises, when his request for dissolution under art XVI(6) is refused by HRH, is he in the circumstances required to resign from his office? The learned High Court judge agreed with the appellant that on the wording of art XVI(6) he was not so required. He rejected the argument put forth by the learned counsel for the respondent and the attorney general that because of the word 'shall' in the said article it is, therefore mandatory for him to tender the resignation of the executive council. In his judgment the learned High Court judge said:

> But in my view no matter how mandatory is the word 'shall' in art XVI(6), it cannot be read to mean that the office of Menteri Besar becomes or deemed to be vacant if the Menteri refuses to resign under the circumstance of art XVI(6) of the Perak's State Constitution. It cannot be done because the language of art XVI(6) is so plain and obvious. What is so plain and obvious on art XVI(6) is that the Menteri Besar shall tender his resignation if he faces the circumstances specified in the said article which is that he has ceased to command the confidence of the majority in the State Legislative Assembly.

[52] The finding of the High Court on this issue was reversed by the Court of Appeal. Raus Sharif JCA (as he then was) in his judgment at para 50 stated:

> 50 The question of Perak having two Menteri Besars does not arise. Article XVI(6) of the Perak State Constitution and established convention, demand that once the Menteri Besar is made to know

A that he has lost the confidence of the majority of the members of the Legislative Assembly, he should take the honourable way out by tendering his resignation and the resignation of the executive council. If the Menteri Besar refuses or does not tender his resignation and the resignation of the executive council, as had happened in this case, the B fact remains that the executive council is dissolved (which include the Menteri Besar) on account of the Menteri Besar losing the confidence of the majority of the members of Legislative Assembly. Therefore, it is not necessary for the DYMM Sultan of Perak to remove Nizar and the other members of the executive council. The DYMM Sultan of C Perak in exercise of His Royal Prerogative under art XVI(2)(a) of the Perak State Constitution is at liberty to appoint another Menteri Besar to replace Nizar. But His Royal Highness must appoint someone who has the command and the confidence of the majority of the members of the Legislative Assembly. In the present case, there D is no doubt that Zambry has the majority support of the members of the Legislative Assembly. He has the support of 31 members from 59 members of the Legislative Assembly.

E **[53]** It is not in dispute that it is within the discretion of HRH to withhold consent to a request for dissolution of the LA (see art XVIII(2)(b)). Given that HRH may reject the request to dissolve the LA then, if that happens, the question arises, is the appellant required by law to tender his resignation? The answer to this issue turns very much on the effect to be given to the word F 'shall' in art XVI(6). According to *Words, Phrases and Maxim Legally and Judicially Defined*, the word 'shall' is interpreted to mean:

> In common parlance, a term which, it is said, has always a compulsory meaning, and in its common and ordinary usage, unless accompanied by qualifying words which show a contrary intent, always refers to the future; but it may be used in the G sense of 'must' of which it is a synonym. As used in statutes, the word is generally mandatory; although it is not always imperative but may be consistent with an exercise of discretion. Thus it may be construed to mean 'may' when a right or benefit to any one depends on its imperative use; when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any H individual by giving it that construction; or when it is absolutely necessary to prevent irreparable mischief, or to construe a direction so that it shall not interfere with mental branches of government; and it also means 'may' when used by a legislature in a grant of authority to a Court (Ame Cyc). The word 'shall' in its ordinary signification is mandatory though there may be considerations which I would influence the Court in holding that the intention of the legislature was to give a discretion.

(See also *Perwira Affin Bank Bhd v Tan Ah Tong* [2003] 5 MLJ 193; *Public Prosecutor v Chang Han Yuan* [1999] 4 MLJ 49; *SOP Plantations (Suai) Sdn Bhd v Ading AK Layang & Ors* [2004] 4 MLJ 180; *Pow Hing & Anor v*

Registrar of Titles, Malacca [1981] 1 MLJ 155; *London & Clydeside Estate Ltd v Aberdeen District Council & Anor* [1980] 1 WLR 182; and *Coutts v Commonwealth of Australia* (1985) 59 ALR 699.

[54] In *Amir Kahar*'s case the word 'shall' was construed to have the mandatory effect. The court said 'Under the circumstances, if the Chief Minister refuses or does not tender the resignation of the members of the Cabinet which includes himself, or if he tenders the resignation of himself alone, the fact remains that the Cabinet is dissolved on account of him losing the confidence of the majority of the members of the assembly and it is not necessary, therefore, for the Yang di-Pertua Negeri as a last resort to remove the Chief Minister and the other members of his Cabinet' (see p 194).

[55] Similarly here, on the literal interpretation of art XVI(6), we are of the view that the word 'shall' should be given a mandatory effect. Therefore, it is incumbent upon the appellant in the circumstances of this case to tender the resignation of the executive council. The term executive council by definition includes the MB (see art XVI(2)). We, therefore, agree with the respondent that the refusal on the part of the appellant to resign after having been directed to do so by HRH clearly went against the express provisions of art XVI(6). It cannot be the intention of the framers of the State Constitution that in the circumstances, it is open to the appellant whether to resign or to stay on as MB. The word 'shall', in our opinion, ought to be given a mandatory effect, otherwise, it would lead to political uncertainty in the state. The appellant cannot continue to govern after having lost the support of the majority. To allow him to do so would be going against the basic principle of democracy. However, we would add that this by no means is the end of the matter, as it is always open to the appellant to bring a vote of no confidence against the respondent in the LA or make a representation to HRH at any time if he thinks that the respondent does not enjoy the support of the majority of the members of the LA.

CONCLUSION

[56] In the upshot we would answer the questions posed to us as follows:

(a) the answer to the first question will be in the affirmative;

(b) as for the second question, our answer is that under art XVI(6) the question of confidence in the MB may be determined by means other than a vote of no confidence in the LA; and

(c) as for the third question our answer is that if the MB refuses to tender the resignation of the executive council under art XVI(6) the MB and the executive council members are deemed to have vacated their respective offices.

[57] The appeal is accordingly dismissed. No order as to cost. Deposit to be refunded to the appellant.

Appeal dismissed.

Reported by Kanesh Sundrum